Premier Home Health Care Services, Inc. d/b/a Metropolitan Home Health Care *and* SEIU 1199 New Jersey Health Care Union. Case 22–CA–28089

September 11, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 26, 2008, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Premier Home Health Care Services, Inc. d/b/a Metropolitan Home Health Care, Elmwood Park and Weehawken, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) by refusing to provide the Union with requested financial information that was necessary and relevant to the Union's bargaining responsibilities. *Circuit-Wise, Inc.*, 306 NLRB 766 (1992) (finding that requested financial information was relevant to evaluation of respondent's bargaining proposal). We reject the Respondent's argument, on exception, that the requested financial information was neither relevant nor necessary because it never claimed an inability to pay. The Board has previously rejected that argument, and we do so here. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

In addition, we agree with the judge that the Respondent did not meet its burden of proving that it had a legitimate and substantial confidentiality interest in the requested information. See, e.g., *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991); *Lasher Service Corp.*, 332 NLRB 834, 834 (2000). While the Respondent excepts to the judge's finding that it bore this burden, the Respondent does not argue on exception that it demonstrated a confidentiality interest in the requested information.

Bert Dice-Goldberg, Esq., for the General Counsel.
James P. Granello, Esq., of White Plains, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in Newark, New Jersey, on April 23, 2008. The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, refused to provide information to the Union concerning Respondent's proposal for a "margin split" during negotiations for an initial collective-bargaining agreement. Respondent denies that it has violated the Act.

On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the parties on May 28, 2008, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with offices and places of business in Elmwood Park and Weehawken, New Jersey, is engaged in the provision of home health care services. Annually Respondent purchases and receives at its New Jersey facilities good valued in excess of $50,000 directly from points outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce with the meaning of Section 2(2), (6) and (7) of the Act, and that SEIU 1199 New Jersey Health Care Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Negotiations

The Union was certified on April 6, 2005 as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time certified home health aides employed by the Employer from its Elizabeth, Elmwood Park and Weehawken, New Jersey facilities, but excluding all office clerical employees, coordinators, employment coordinators, licensed practical nurses, managerial employees, registered nurses and other professional employees, guards and supervisors as defined in the Act.[1]

Negotiations between Respondent and the Union commenced. The Union was represented by Larry Alcoff, campaign director of SEIU, Milly Silva the 1199 New Jersey president and other Union and employee participants. The employer was represented by Greg Turchan, chief operating officer, Jeannie O'Sullivan, vice president of administration and human resources and James P. Granello, Esq., General Counsel of Premier Home Health Care Services, Inc.[2]

Larry Alcoff was the only witness to testify herein. Alcoff explained that the State of New Jersey has a practice of provid-

[1] The Elizabeth location has since been closed.

[2] Metropolitan Home Health Care of New Jersey is a subsidiary of Premier Home Health Care Services, Inc.

ing a "pass-through" increase to be given to home health care employees for the benefit of the actual care providers. At the negotiations conducted on June 26, 2007 the Union and the company discussed the 65 cent per hour pass-through that had recently been enacted by the New Jersey legislature. This sum had to be applied to the wages and benefits of the home health care employees. The 65 cent pass-through was based on only a portion of Medicaid hours; these are called Medicaid Z Code. The employer proposed that the pass-through be spread across all the hours worked by the employees. This would result in a 10 cent increase in Weehawken and an 18 cent increase in Elmwood Park or the spread could result in a 14 cent increase at both locations.

The company also proposed a formula for future increases to wages and benefits based on its revenue. Alcoff testified that the company has four sources of income: contracts with agencies such as the Visiting Nurse Association; reimbursement from two different types of Medicaid, that is, Medicaid Z Code and Medicaid Other; and cash payments from patients or from patients' individual private insurance coverage. By combining these sources of revenue over a period of time the company arrived at an Average Weighted Reimbursement Rate (AWRR).

On June 26 the Respondent proposed that on July 1 of each year it would compare the Average Weighted Reimbursement Rate for the last six months and it would calculate how this sum had increased from the prior year. The increase in the AWRR would be allocated 67% to wages, benefits, payroll taxes and other direct workers costs and 33% to general and administrative costs and profit. The Respondent called this proposal a margin split proposal. In essence, it would split the margin of increase in AWRR 67% to employees and 33% to the employer.

Alcoff testified that the Union did not agree to the employer's June 26 proposal. Alcoff did not say that that the union was opposed to the margin split but concept but he indicated that the Union needed more information. Turchan said he understood and that he would get back to the Union.

On July 25, the Union representatives met with Respondent. Granello and O'Sullivan were present on behalf of the employer. Alcoff testified that the employer presented a new proposal that differed from the one given to the Union one month before. The margin split based on an increase of the Average Weighted Reimbursement Rate was now defined at 65% for the employees and 35% for the company on both July 1, 2010 and July 1, 2011. The company's proposal also included the following paragraph:

> If a pass-through is provided that only affects aide wages and benefits in any contract year the agreed upon wage or benefit adjustment for that year is frozen until a gross margin and economic impact review is conducted by the Company. The Company will have 90 days to conduct such review from the FINAL legislative and/or subsequent regulatory implementation/process completion date. If the Gross Margin is impacted and is below the current GM% for that year as a result of such legislation the Company has the right to delay, adjust, modify, and /or cancel any such wage or benefit adjustments.

The Union asked Respondent some questions about its proposal at the July 25 bargaining session.[3] The Union asked when the company had last negotiated increases with the private insurers, with the Visiting Nurses or with various county agencies. The Union asked how those rates had changed over the last three years. The reason for the request was that Respondent's wage increase proposal was based on an average weighted rate from all the company's sources of income; the Union wanted to determine what wage increases such a formula was likely to provide. Alcoff also asked what specific costs Respondent would include in the margin split formula as wages, benefits and payroll taxes to see whether those categories were properly attributable to labor costs. Finally, Alcoff asked how the items to be included in the general administrative costs and profits had grown or decreased over the last three years so that the Union could determine whether Respondent was maintaining an existing split or was bargaining for a windfall. Alcoff explained to the employer why the Union needed the information it was requesting.

The day after the bargaining session the Union sent Respondent a written information request dated July 26, 2007. The relevant portions of the Union's letter were as follows:

> Please provide the rates from all sources (Medicaid, private pay, private insurance, and contracts) for each office in 2005, 2005, 2006, 2007, and 2008, if known.
>
> Please provide the "margin split" in 2004, 2004, 2006 and 2007. Please show total revenue in each year and a breakdown by component the expenses in each year that fall under the categories of "General and Administrative costs and profit" and wage/benefits/payroll taxes, include all supporting documents utilized to make the calculations.

Granello also addressed a letter dated July 26 to Alcoff. Granello asked that the Union make its information request in writing and provide an explanation for seeking certain information.

On August 28 Granello wrote to Alcoff providing certain information not relevant to the instant case. Concerning the matters at issue herein, Granello stated:

> As to the request to be provided the rates from all sources (Medicaid, private pay, private insurance and contracts) for each office for the years 2004 to 2008, if known, the company objects to providing its confidential and proprietary information to the Union other than providing its Medicaid rates for the years in question which are matters of public record. Also, we are providing you with the Average Weighted Wage Rate for the period July 2005 to July 2007. The company has a legitimate interest in maintaining the confidentiality of its private business information which if publicized would arguably harm the competitive position. Lafayette Park, 326 NLRB 824 (1998).
>
> As to providing the Union with the company's "margin split" for the years 2004 to 2007 showing the total revenue and a breakdown by component expenses in each year the (sic) fall

[3] Other subjects of bargaining were discussed by the parties and the Union asked for information about those matters, however those items are not relevant to the instant case and will not be dealt with herein.

under the categories of "General and Administrative costs and profits" and wage/benefit/payroll taxes, the company objects to providing the Union with its confidential and proprietary information at this time, particularly in light of the Union's rejection of the company's margin proposal because the company will not agree to include workers from West Orange and Scotch Plains as part of the bargaining unit. If the Union agrees to the company's margin proposal, then the company is willing share information that can be used to verify the distribution of revenue.[4]

On September 18 Alcoff wrote to Granello. The relevant portions of his letter follow:

Please provide the rates for all sources (Medicaid, private pay, private insurance, and contracts) for each office in 2004, 2005, 2006, 2007 and 2008, if known. *You refused to provide this information claiming confidentiality and potential harm to the company's competitive position. The Employer's last proposal was based on a sharing of revenue. In order for the Union to fairly evaluate the Employer proposal, this information is essential. The Union is prepared to sign a narrowly tailored confidentiality agreement as a condition to receive such information.*

Please provide the "margin split" in 2004, 2005, 2006, and 2007. Please show total revenue in each year and a breakdown by component the expenses in each year that fall under the categories of "General and Administrative costs and profit" and wage/benefits/payroll taxes, include all supporting documents utilized to make the calculations. *Again, you refused to provide this information despite it being at the center of the current Employer proposal. The Union stated that while we made a different counterproposal, we remained open to the Employer proposal but needed more information. The Union is prepared to sign a confidentiality agreement in order to address the Employer's concerns.* (Italics in original)

Alcoff testified that he never received a reply to the Union's offer to sign a confidentiality agreement.[5]

B. Discussion and Conclusions

The General Counsel argues that the information requested by the Union is necessary and relevant to the Union's performance of its responsibilities. Respondent argues that the company's financial information need not be turned over because the company has not asserted a financial inability to meet the Union's demands in collective-bargaining negotiations. Respondent also argues that because it never asserted an inability to pay it had no duty to enter into a confidentiality agreement with the Union as a condition of producing the information.

Respondent made a wage increase proposal and then a modified proposal to the Union in collective-bargaining negotiations. The company's proposal was based on the Average Weighted Reimbursement Rate. The AWRR amounts to the company's income from all sources averaged over a period of time. Thus, Respondent's wage increase proposal was based on a comparison of its past and future income from all sources. Respondent proposed to split future increases in its income from all sources between the employees and the company; this was the margin split proposal. The gross margin equaled the increase in the company's income. Respondent's first margin split proposal was to allocate 67% of the increase in its income to wage increases; this was later modified to 65%.

Respondent also modified its margin split proposal to provide that if the legislature enacted a pass-through for wages that resulted in a lower gross margin than the year before, that is, less of an increase in the company's income than had been enjoyed the year before, the company had the right to delay, adjust, modify and cancel wage increases for employees.

Thus, it is clear that the employer's proposals of June 26 and July 25 based future employee wage increases on the total income of the employer and the degree to which that income exceeded the income of the prior year.

Further, the employer's proposal was based on a split between administrative and labor costs. It is evident that the amount of an actual wage increase depended on what other categories would be included in labor costs. If the cost of unemployment insurance, for example, was considered a labor cost then that would reduce the amount left over for a wage increase.

It is well established that an employer has an "obligation to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The Board applies a "discovery-type standard" when there is a "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." 385 U.S. at 437.

In order for the Union to evaluate the Respondent's proposals for wage increases the Union would require information that enabled it to calculate the likely outcome of the formula proposed by the company. The Union would require figures showing the amounts of all the factors that bear upon the calculation of the Average Weighted Reimbursement Rate. These amounts include income from Medicaid, cash payments from individuals, private insurance and contracts with agencies. The Union requested information dating back to 2005 so that it could evaluate the history of the Average Weighted Reimbursement Rate and determine whether it should agree to this type of formula as a basis for future wage increases. I find that this information is relevant and necessary to the Union in carrying out its duty to bargain on behalf of the unit employees.

Similarly, the information concerning the various components of the margin split percentages proposed by the Respondent is necessary for the Union to calculate the likely outcome of the wage increase formula proposed by the company. The Union asked for the margin split starting with 2004 so that it could determine whether this mechanism would be beneficial to the unit employees based upon a trend over several years. The Union asked for the details of the expenses that the company

[4] I note that there is no testimony in the record that the Union rejected the margin proposal and there is no testimony in the record concerning any controversy over the West Orange and Scotch Plains offices.

[5] I note that the record contains correspondence between the Respondent and the Board Agent assigned to investigate the case on this subject.

would allocate to labor costs and to administrative costs so that it could see whether this type of wage increase formula would work to the advantage of the employees based upon the trend of prior years. This information is relevant and necessary to the Union in carrying out its duty to bargain on behalf of the unit employees.

I note that the Respondent has not argued that the time periods covered by the Union's requests for information are unreasonable or irrelevant.

Respondent urges that the information requested by the Union is confidential and proprietary. Respondent has not presented any testimony to support this assertion. It merely argues that it should not be required to provide financial information to the Union. I note that the Union offered to enter into a confidentiality agreement and offered to discuss such an agreement with the company. [6]

The Board has set forth the framework to be applied when an employer refuses to provide information on the grounds of confidentiality:

> [I]n dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests. *Pennsylvania Power and Light*, 301 NLRB 1104, 1105–1106 (1991). [Citations omitted.]

The Respondent has not provided any evidentiary grounds upon which I could find that its need to maintain the confidentiality of its financial information outweighs the Union's demonstrated need for information to evaluate the company's wage proposals. Indeed, the company has not specified which portions of the requested information are confidential. Instead, it has issued a blanket claim of confidentiality. Under the circumstances, I must find that Respondent has not shown that any of the requested information is confidential. Respondent's failure to bargain with the Union pursuant to the Union's offer to reach an accommodation concerning the production of financial information is further evidence of Respondent's unlawful refusal to furnish necessary information.

I find that Respondent violated Section 8(a)(1) and (5) of the Act when it failed to turn over the information requested by the Union. *New Surfside Nursing Home*, 330 NLRB 1146 (2000).

[6] Respondent also argues that it has not claimed inability to pay and thus the requested information is irrelevant. This argument is without merit and I shall not discuss it further.

CONCLUSIONS OF LAW

1. SEIU 1199 New Jersey health Care Union is the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> All full-time and regular part-time certified home health aides employed by the Employer from its Elmwood Park and Weehawken, New Jersey facilities, but excluding all office clerical employees, coordinators, employment coordinators, licensed practical nurses, managerial employees, registered nurses and other professional employees, guards and supervisors as defined in the Act.

2. By refusing to provide necessary and relevant information concerning its Average Weighted Reimbursement Rate Margin Split wage proposal to the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Premier Home Health Care Service, Inc., d/b/a Metropolitan Home Health Care, Elmwood Park and Weehawken, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with SEIU 1199, New Jersey Health Care Union by denying the Union the information requested in its letter of September 18, 2007.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in writing, the information it requested in its letter dated September 18, 2007.

(b) Within 14 days after service by the Region, post at its facilities in Elmwood Park and Weehawken, New Jersey, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 28, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with SEIU 1199, New Jersey Health Care Union by denying the Union necessary and relevant information concerning our margin split wage offer for the following appropriate unit:

> All full-time and regular part-time certified home health aides employed by the Employer from its Elmwood Park and Weehawken, New Jersey facilities, but excluding all office clerical employees, coordinators, employment coordinators, licensed practical nurses, managerial employees, registered nurses and other professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union, in writing, the information it requested on September 18, 2007.

PRIMIER HOME HEALTH CARE SERVICE, INC., D/B/A
METROPOLITAN HOME HEALTH CARE